



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT HOMA BAY
CIVIL APPEAL NO.71 OF 2019

BETWEEN

CECYPO (K) LIMITEDAPPELLANT

AND

KENNEDY OTIENO AGONDA.....RESPONDENT

(Being an Appeal from the judgment in Oyugis Chief Magistrate's CMCC No. 179 of 2018 by Hon. J.S Wesonga –Senior Resident Magistrate).

JUDGMENT

1. The appellant herein was sued in Oyugis Chief Magistrate's CMCC No. 179 of 2018 for a claim that arose from a road traffic accident. The accident was between motor vehicle KCG 655M and a motor cycle the respondent was riding as a pillion passenger. They were knocked from behind. He sustained injuries. The learned trial magistrate delivered judgment dated 5th July 2019 and made an award of Kshs.300,000/= general damages.

2. The appellant was aggrieved by the said judgment and filed this appeal and was represented by the firm of Morara Apiemi & Nyangito Advocates. Six grounds of appeal were raised as follows:

- a. That the learned trial Magistrate erred in law and fact in relying on hearsay evidence thereby arriving at a finding on liability that is untenable, unfair and unjust to the appellant;
- b. That the learned trial magistrate erred in law and fact by failing to judiciously analyze the evidence adduced at trial thereby arriving at a finding on liability that was untenable, unfair and unjust;
- c. That the learned trial magistrate erred in law and fact by holding the appellant 100% liable against the weight of evidence adduced at trial which finding is untenable, unfair and unjust to the appellant;
- d. That the learned trial magistrate erred in law and fact in making a finding that the plaintiff's evidence was uncontroverted which finding was inconsistent with the evidence on record and rendered the finding on liability wholly untenable;
- e. That the learned trial magistrate erred in law and fact in disregarding the appellant's evidence thereby arriving at a finding that is unfair, and unjust to the appellant;
- f. That the learned trial magistrate erred in law and fact in awarding the plaintiff a sum of kshs.300,000/- as general damages which award was inordinately high and manifestly excessive that it amounted to a miscarriage of justice.

3. The appeal was opposed by the respondents through the firm of Nyatundo & Company Advocates. It was contended that the award was not inordinately high.

4. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of **Selle vs. Associated Motor Boat Co. Ltd. [1965] E.A. 123**, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.

5. Though the appellant contended that there was no sufficient evidence on liability, this is not supported by the evidence on record. The respondent in his evidence told the court that he saw light of an oncoming vehicle. This was confirmed by the evidence of Sergeant Samwel Kerosi (PW2). This police officer testified that the driver of the offending lorry was Richard Kiplangat Kipruto (DW1). He said that the record showed that the said driver was overtaking but swerved to the left on seeing an oncoming vehicle. This is when he hit the motor cycle on which the respondent was travelling as a pillion passenger. He further stated that the driver recorded a statement at the police station and admitted that he hit the motor cycle from the rear.

6. When Richard Kiplangat Ruto (DW1) testified, he contended that it was the motor cycle that hit him from the rear.

7. Without an explanation why a statement attributed to him stated differently, the assumption to make was that the change was to serve to absolve him from blame. The learned trial magistrate was therefore justified to find that he was 100% liable for the accident.

8. An appellate court will only interfere with an award of the trial court if certain circumstances are satisfied. In **Butt vs. Khan [1981] KLR 349** at page 356 Law JA stated:

...an appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived a figure which was either inordinately high or low.

9. The appellant contends that the award of Kshs. 300,000/= general damages was inordinately high. The appellant sustained the following injuries:

- a. Bruises on the right shoulder;
- b. Multiple bruises on the hands;
- c. Multiple bruises on the right knee; and
- d. Deep anal tear.

10. In the trial court, the appellant relied on the case of **Ndungu Dennis v Ann Wangari Ndirangu & another [2018] eKLR** and urged the court to award Kshs.150,000/= general damages. The plaintiff sustained the following injuries:

- a. Minor bruises on the back;and
- b. Tenderness on the right leg.

The injuries included minor bruises on the back; no fractures on the tibia or fibula area of the right leg which was hit; tenderness on the right leg. It was concluded that the injuries were “soft tissue injuries.”

These injuries were classified as “soft tissue injuries. An award of Kshs.100,000/= was given.

11. The injuries in the instant case were equally soft tissue injuries in nature though slightly severe than the injuries in **Ndungu Dennis v Ann Wangari Ndirangu & another**. I am therefore persuaded to interfere with the award. I accordingly set aside the award by the learned trial magistrate and substitute it with an award of Kshs. 200,000/= which in my opinion would be adequate compensation. The appellant will be entitled to half costs in this court.

DELIVERED AND SIGNED AT HOMA BAY THIS 19TH DAY OF MAY, 2021

KIARIE WAWERU KIARIE

JUDGE